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IN THE

Supreme Court of the United States

[redacted].

[redacted].

OCTOBER TERM, 1941.

No. 14.

COMMERCIAL MOLASSES CORPORATION,
Petitioner,

against

NEW YORK TANK BARGE CORPORATION, as Chartered Owner of the Tank Barge *T. N. No. 23,*
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF FOR RESPONDENT ON REHEARING.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 584.

OCTOBER TERM, 1941.

No. 14.

COMMERCIAL MOLASSES CORPORATION,
Petitioner,

against

NEW YORK TANK BARGE CORPORATION,
as Chartered Owner of the Tank Barge "*T. N. No. 73*",
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF FOR RESPONDENT ON REHEARING.

I.

ARGUMENT.

Since the first hearing of this case before this Court there has appeared a recent English decision by the House of Lords in *Imperial Smelting Corp. Ltd.* v. *Constantine S. S. Line, Ltd.*, Lloyds Law Reports, Vol. 70, No. 1, July

8th, 1941, page 1. That case arose out of the frustration of a charter party due to a boiler explosion on the vessel shortly before she entered on the charter party. The charterer proceeded against the shipowner for damages. The fact-finder was unable to find from the testimony either that the explosion was, or that it was not, due to negligence or default of the owner, and concluded that the cause of the accident had not been proven. The House of Lords, reversing the Court of Appeals and reinstating the opinion of the Kings Bench, held that the burden was on the charterer to prove negligence or default of the owner, and that under the findings of fact the burden had not been sustained. Viscount Simon and Lord Wright, in their separate opinions, made the following comments as to the burden of proof on the ordinary issue of negligence or unseaworthiness:

Viscount Simon:

> (p. 7) "Where the onus is on the shipowners, under the first principle, that onus is discharged by proving facts from which the inference that the accident was not caused by negligence is as equally strong, that is, equally consistent with the facts as the inference that it was caused by negligence." (Quoting from Abrath *v.* North Eastern Ry. Co., 11 Q. B. D. 440, 456.)
>
> (p. 9) "If a ship sails and is never heard of again, the shipowner can claim protection for loss of the cargo under the express exception of perils of the sea. To establish that, must he go on to prove (a) that the perils were not caused by negligence of his servants, and (b) were not caused by any unseaworthiness? I think clearly not. He proves a *prima facie* case of loss by sea perils, and that he is within the exception. If the cargo-owner wants to defeat

that plea it is for him by rejoinder to allege and prove either negligence or unseaworthiness. The judgment of the Court of Appeal in The Glendarroch (1894), p. 226, is plain authority for this."

Lord Wright:

(pp. 22-23) "The maxim *respice finem* applies, though there may be provisional presumptions shifting the onus of proof from time to time during the progress of the case. This is well illustrated in Ajum Goolam Hossen & Co. *v.* Union Marine Insurance Company, [1901] A. C. 362, an action on a marine insurance policy for the loss of a ship which had sunk through causes not explained. The defence was that the ship was unseaworthy. The underwriters showed facts which raised a presumption in favour of unseaworthiness, and shifted at that stage the onus of proof, but at the end the Court held that the real cause of the loss was unknown, that unseaworthiness was not proved and that the defence failed. In the same way, if negligence is alleged to override the defence of excepted perils, it must be alleged and proved affirmatively. If the matter is left in doubt when all the evidence has been heard, the party who takes upon himself to affirm fault must fail. * * *

"On the ruling of the Court of Appeal, the shipowner has placed upon him the unusual task of proving a negative. * * *

"In modern times the practice of having special contracts has been superimposed on the custom of the realm. These contracts contain exceptions. If the carrier pleads an exception, the goods-owner may counter by pleading the fault of the carrier, but the onus of proving that, as also of proving an allegation of unseaworthiness, is, as I have already explained, on the goods-owner who makes it."

II.

When a vessel puts to sea on a voyage and is never heard from thereafter, there is no presumption in law that her disappearance was due to unseaworthiness. Without any proof from her owner that the loss was *not* due to unseaworthiness, the fact-finder may base upon the facts of sailing and disappearance an inference of fact that the loss was due to perils of the sea.

> *Brown* v. *Nelson* (1804) 1 Caines (N. Y.) 525;
> *Gordon* v. *Boune*, (1807) 2 Johns (N. Y.) 150;
> *Houston* v. *Thornton* (Nisi Prius 1816) Holt, 242;
> *Watson* v. *King* (Nisi Prius 1815) 1 Stark 121;
> *Twemlow* v. *Oswin* (Nisi Prius) 2 Campbell 85;
> *Green* v. *Brown* (Kings Bench) 2 Strange 1199;
> *Koster* v. *Reed* (Kings Bench 1816) 6 Barnewall & Cresswell 19.

Or, when a vessel disappears in times of war and in areas of enemy activities, the fact-finder may reach an inference of fact that the loss was due to a war risk.

> *Monro Brice & Co.* v. *Marten* [1920] 3 K. B. 94;
> *Macbeth & Co.* v. *King* (1916) 32 Times Law Reports, 581;
> *Enterpe Steamship Co.* v. *North of England P. & I. Assoc.* (1917) 33 Times Law Reports, 540.

III.

The foregoing authorities, together with those cited in respondent's original brief, show that the courts in this country and in England have adhered uniformly to the following principles:

> There is not any presumption in law that the sinking of a vessel is due to unseaworthiness.
>
> Unseaworthiness as the cause of the sinking must be proven by him who asserts it.
>
> A "presumption" of unseaworthiness, such as is in controversy here, is merely a rational inference of fact, to be drawn by the fact-finder, if at all, upon all the evidence in the case.
>
> Such an inference may be drawn when all the facts point to unseaworthiness as the only rational explanation of the sinking. If the facts offer an alternative explanation and leave the fact-finder in doubt as to the true cause, unseaworthiness is not proven and the burden of proof is not sustained.

Judge Learned Hand, basing the opinion of the Circuit Court of Appeals in the present case upon the foregoing principles, carefully distinguished between the rational inference which is involved and a true "presumption". (R. 297).

The general principles summarized above are not affected by those cases in which common carriers, who are insurers, can avail themselves of statutory defenses only upon proof of seaworthiness, or due diligence, as a condition precedent to the relief granted by the statute. Such cases do not turn upon any inference or presumption, but upon the statutory provisions. If the cases cited by petitioner are examined with that distinction in mind, it will

be found that they do not conflict with, but support, the general principles summarized above.

Those principles apply to a private carrier, such as respondent admittedly was.

CONCLUSION.

THE DECREES OF THE LOWER COURTS SHOULD BE AFFIRMED.

Respectfully submitted,

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CLETUS KEATING,
L. DE GROVE POTTER,
RICHARD SULLIVAN,
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New York, N. Y.,
October 10th, 1941.